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Rupert B. Hurley Jr.

November 23, 2009

DATE

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Inventors: KINARD et al

Group Art Unit: 1761

Serial No.: 09/933,291

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Title: "CASE-READY PACKAGE HAVING ABSORBENT PAD"

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APPEAL BRIEF UNDER 37 CFR § 41.37

Sir:

This Brief is filed further to the Notice of Appeal filed 20 July 2009, which is dated stamped 22 July 2009 by the OIPE. The two-month period for the filing of the brief is extended two months, i.e., through Monday, 23 November 2009, by the accompanying request for a two-month extension of time. Pursuant to 37 CFR §41.20(b)(2), the undersigned authorizes the PTO to charge Deposit Account No. 07-1765 in the amount of the fee for the filing of this appeal brief, as well as the fee for the extension of time.

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(1) Real Party in Interest

The real party in interest is Cryovac, Inc., assignee of the above-referenced patent application.

(2) Related Appeals and Interferences

There are no other appeals, interferences or judicial proceedings known to Appellant, Appellant's legal representative, or Assignee which may be related to, directly affect, be directly affected by, or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The claims on appeal are pending Claims 1, 5-10, and 12-24. A copy of Claims 1, 5-10, and 12-24 appears in the Appendix. Claims 7-10, 12-14, 16-18, 22, and 24 are as originally filed. Claims 1, 5, 6, 15, 19-21, and 23 have been amended once. Claims 2-4 and 11 stand canceled.

(4) Status of Amendments

An amendment under 37 CFR 1.116 is being filed concurrently with the filing of this brief. This amendment amends Claim 12 to depend from Claim 1 rather than from canceled claim 11. Thus, Appellants expect that the amendment under 37 CFR 1.116 will be entered as it merely places the claims in better form for appeal by addressing a formal matter. No other amendment has been filed after the final office action mailed 18 March 2009.

(5) Summary of the Claimed Subject Matter

As a first aspect, the invention is directed to a case-ready package (10) for containing a food product (F) which exudes juice and which has a support member (11), a lid member (12) comprising a flexible film, and an absorbent pad (13). [Fig 1, Fig 2, Fig 3, Page 6 lines 1-3] The absorbent pad (16) comprises an upper web (15) comprising a flexible film, a liquid-permeable lower web (14) comprising nonwoven fiber having a hydrophilic composition thereon, and an absorbent layer (16) between the upper web (15) and the lower web (14). [Fig 2, Fig 3, Page 6 lines 3-6] The upper and lower webs (15 and 14) each extend outward of the absorbent layer (16), the upper and lower webs (15 and 14) are attached to one another around an entire outer perimeter portion of the pad (13). [Fig 2, Fig 3, Page 6 lines 6-10] The upper and lower webs (15 and 14) together surround and contain the absorbent layer (16), and the case-ready package (10) further comprises modified atmosphere or vacuum between the support member (11) and the lid member (12). [Fig 2, Fig 3, Page 6 lines 8-10 and lines 16-17] In the lower web, the nonwoven fiber of comprises at least one member selected from the group consisting of polyolefin, polyamide, and polyester. [Page 7 lines 17-19]

Preferably, the modified atmosphere comprises oxygen in an amount of from 60 to 80 percent, based on total atmospheric weight within the package. [Page 6 lines 17-19]

Preferably, the hydrophilic composition comprises at least one member selected from the group consisting of polysorbate, ethoxylated linear alcohol, fatty amine oxide, alkanolamide, and block copolymers of ethylene oxide or propylene oxide with dimethylsiloxane that are coupled to polar groups containing a hydrophilic moiety. [Page

8 lines 1-5] Preferably, the hydrophilic composition is present on the second web in an amount of from about 0.1 to 10 weight percent, based on the weight of the lower web.

[Page 8 lines 5-8]

As a second aspect, the invention is directed to a packaged product in which the package is as set forth in the first aspect of the invention, described above. The packaged product has within the package a food product (F) which exudes juice. [Fig. 1; Page 9 lines 4-8, Page 10 lines 5-7]

As a third aspect, the present invention pertains to a process for making a case-ready package for containing a food product which exudes juice. [Fig 1, Page 9 lines 9-10] The process comprises (A) placing a product to be packaged on a support member having a base; (B) placing an absorbent pad on the support member; (C) evacuating atmosphere from around the product and support member; and (D) placing a lid member over the product and the support member so that the product is surrounded by the lid and the support member. [Fig 1, Fig 2, Fig 3, Page 9 lines 10-16] The absorbent pad is in accordance with the first aspect of the invention, set forth above. [Page 9 lines 16-17]

(6) Grounds of Rejection to be Reviewed on Appeal

- I. Whether Claims 1, 6-10, 14-18, 21, and 22 Are Unpatentable under 35 USC 103(a) as Obvious over SANFILIPPO et al (USPN 6,221,411) in view of FONTENOT et al (US Patent Pub. No. 2002/0182102)
- II. Whether Claim 5 Is Unpatentable under 35 USC 103(a) as Obvious over SANFILIPPO et al in view of FONTENOT et al, further in view of WILES (GB 2296905)
- III. Whether Claim 13 Is Unpatentable under 35 USC 103(a) as Obvious over SANFILIPPO et al in view of FONTENOT et al, further in view of MILLER et al (USPN 4,321,997)
- IV. Whether Claims 19 and 20 Are Unpatentable under 35 USC 103(a) as Obvious over SANFILIPPO et al in view of FONTENOT et al, further in view of BAIR (USPN 5,135,787) and LeKHAC (USPN 4,743,244)
- V. Whether Claims 23 and 24 Are Unpatentable under 35 USC 103(a) as Obvious over SANFILIPPO et al in view of FONTENOT et al

NOTE: The issues above do not include a rejection of pending claim 12. Rather, claim 12 appears to remain objected to as depending from a rejected base claim, allowable if written in independent form.

(7) ARGUMENT

I. Claims 1, 6-10, 14-18, 21, and 22 Are Patentable Over SANFILIPPO et al in view of FONTENOT et al

Section 1 of the final Office Action of 18 March 2009 states that the 35 USC 103(a) rejection of Claims 1, 6-10, 14-18, and 21-22 is repeated for the reasons on page 2 of the previous office action, which previous office action (i.e., the non-final office action of 17 July 2008) in turn states that SANFILIPPO et al teaches a meat product, an absorbent pad, a tray, and a lid over the product, with the tray sealed under less than 1% oxygen atmosphere, and that the tray can comprise foam, but that SANFILIPPO et al fails to disclose the particular structure of the soaker pad. Appellants acknowledge that SANFILIPPO et al discloses this combination of features, and that SANFILIPPO et al is indeed silent on the structure of the soaker pad.

The 17 July 2008 office action goes on to state that FONTENOT et al teaches a liner (citing FONTENOT et al ¶ 0026) for a container (citing FONTENOT et al ¶ 0030) for the purpose of absorbing meat juices (citing FONTENOT et al ¶ 0083 and Fig. 2) having a hydrophilic composition thereon (more particularly a wetting agent comprising a blend of sorbitan monooleate and ethoxylated hydrogenated castor oil, citing ¶ 0059), an absorbent layer between the upper web and the lower web (citing ¶ 0056 and Fig. 2), with the upper and lower webs extending outward of the absorbent layer, with the liner therefore being an absorbent pad. The office action goes on to state that the upper and lower webs are attached to one another around the entire perimeter of the pad, with the upper and lower webs together surrounding and containing the absorbent layer, with the layers of the liner being bonded together around the edges of the absorbent material, citing ¶ 0074. Based on these facts, the office action concludes that one of ordinary skill

in the art would have recognized the advantage of providing for the liner of FONTENOT et al in SANFILLIPO et al, which comprises a tray (and therefore a container) depending upon the desired absorption of the end product. The office action further concludes that it would have been obvious for one of ordinary skill in the art at the time of Appellants' invention was made to have provided for a liner, and therefore an absorbent pad, as taught by FONTENOT et al in the package of SANFILLIPO et al in order to absorb meat juices as taught by FONTENOT et al. The office action thereafter refers to specific features recited in Appellants' Claims 8-9, 10, 14&15, 16, and 17, as disclosed (respectively) in FONTENOT et al at paragraphs 0051, 0050, 0037&0038, 0074, and 0074.

In response, Appellants contend that the office action does not set forth a prima facie case of obviousness of any one or more of Claims 1, 6-10, 14-18, 21, and 22 as unpatentable over SANFILIPPO et al in view of FONTENOT et al. Appellants acknowledge that SANFILIPPO et al discloses a meat product on a tray with an absorbent pad between the meat product and the tray, with the tray having a lid film thereover and with the package containing a modified atmosphere. Appellants also agree that SANFILIPPO et al fails to disclose the particular structure of the soaker pad.

However, Appellants disagree with the following statements in section 4 of the 17 July 2008 office action:

(1) "...FONTENOT et al teach[es]...*an upper web comprising a flexible film* (paragraph 0050-0051)...." [Section 4 of 17 July 2008 Office Action, *emphasis added*]

(2) "...FONTENOT et al teach[es]...*a liquid permeable lower web comprising nonwoven fiber* (liquid pervious; paragraph 0058; Figure 2) ...a flexible film (paragraph 0050-0051)...." [Section 4 of 17 July 2008 Office Action, *emphasis added*]

Attention is directed to the fact that, contrary to the statements in the office action, the cross-section of the liner of both Figure 1 and Figure 2 of FONTENOT et al illustrates “impervious backing layer 16” (item 16 is identified in ¶ 0033) as the *lower* layer of the liner, rather than corresponding with Appellants’ recited *upper* web. Figure 2 of FONTENOT et al as well as paragraph 0033 of FONTENOT et al are as follows:

FONTENOT et al

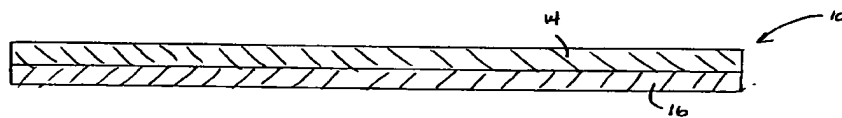


Figure 1

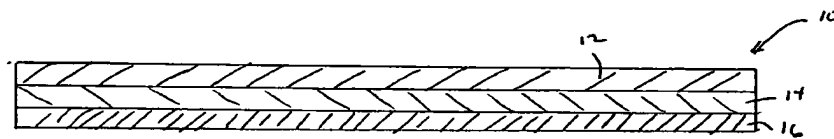


Figure 2

[0033] Illustrated in FIG. 1, the liner 10 of the present invention generally comprises at least two components, an odor controlling liquid absorbent layer 14 and a liquid impervious backing layer 16.

As shown in Figure 1 and Figure 2 of FONTENOT et al, and as described in ¶ 0033 of FONTENOT et al, layer 16 is an impervious backing layer, which is illustrated and described in the lower position. The fact that impervious backing layer 16 of FONTENOT et al is the lower layer is readily apparent from ¶ 0055 of FONTENOT et al:

[0055] In order to help reduce slippage of the liner during use, an outer surface of the liquid impervious layer that will come into contact with the container, drawer or shelf desirable has a coarse, rough or tacky surface. [¶ 0055 of Fontenot et al, emphasis added]

The "...outer surface of the liquid impervious layer..." of FONTENOT et al (i.e., liquid impervious layer 16) that "...comes into contact with the container, drawer or shelf..." would have to be in a position corresponding with the *lower* web 14 of Appellants' invention as illustrated in Appellant's FIG. 2. However, Appellants' claims recite a lower web that is *liquid permeable*, not liquid impermeable. Pending independent Claims 1, 21, and 23 each recite:

...an absorbent pad comprising:

- (i) an upper web comprising a flexible film;
- (ii) a liquid-permeable lower web comprising nonwoven fiber having a hydrophilic composition thereon, the nonwoven fiber comprising at least one member selected from the group consisting of polyolefin, polyamide, and polyester; and
- (iii) an absorbent layer between the upper web and the lower web;....

The position of Appellants' *liquid-permeable* lower web corresponds with the position of the *liquid impervious* (backing) layer 16 of FONTENOT et al. Likewise, the liquid pervious layer 12 of FONTENOT et al is the *upper* layer of the container (see Figure 2 and Paragraph 0058), whereas Appellants' independent claims recite a liquid-permeable *lower* web comprising nonwoven fiber having a hydrophilic composition thereon.

Thus, it is apparent that FONTENOT et al teaches a liner in a position which is the reverse of Appellants' recited liquid permeable web: Appellants' claims recite the liquid permeable web as the *lower* web of the absorbent pad, while FONTENOT et al teaches the liquid permeable web as the *upper* web of the liner. That FONTENOT et al teaches the upper web as the liquid permeable web and the lower web as the liquid impermeable web makes sense, because the title of FONTENOT et al is "Container, Shelf and Drawer Liners Providing Absorbency and Odor Control". Providing a

container, shelf, or drawer liner with a liquid impermeable upper web and a liquid permeable lower web would not provide the container, shelf, or drawer with the absorbency objective of FONTENOT et al. Rather, the combination of a liquid impermeable upper web and a liquid permeable lower web could allow liquid to contact the surface of the container before it is absorbed by the absorbent layer which is between the upper impermeable web and the lower permeable web, defeating the objective of the liner. Providing the liner with a liquid impermeable lower web and a liquid permeable upper web allows the liner to absorb liquid before the liquid can contact and damage the container, shelf, or drawer.

Thus, whether a prima facie case of obviousness has been set forth depends upon whether it would have been obvious to both (i) select the liner of FONTENOT et al for use in the package of SANFILIPPO et al, and (ii) reverse the orientation of the liner of FONTENOT et al before placing it into the tray of SANFILIPPO et al. Appellants contend that the prior art relied upon in the office action provides no reason that would have motivated one of ordinary skill in the art to invert the liner of FONTENOT et al before placing it into the tray of SANFILIPPO et al.

In response to Appellants' argument of no reason to invert, the final office action states:

...Fontenot does not limit the use of the liner to one in which the impervious layer is spatially lower than the other layers, although in the schematic figure the impervious layer is closer to the bottom of the page; furthermore, whether the liner is placed in a container so that the impervious layer faces 'up' or 'down' absorption of meat juices will occur, either from the meat directly or from the bottom of the container. [final Office Action, page 4, lines 4-8]

Appellants contend that the statements in the above excerpt do not address the modification required in order to set forth a prima facie case of obviousness. More particularly, according to MPEP 706.02(j), 35 USC 103 authorizes a rejection of the claims where, to meet the claim, it is necessary to modify a single reference or to combine it with one or more other references, and that the examiner should set forth:

- (A) the relevant teachings of the prior art relied upon, preferably with reference to the relevant column or page number(s) and line number(s) where appropriate,
- (B) the difference or differences in the claim over the applied reference(s),
- (C) the proposed modification of the applied reference(s) necessary to arrive at the claimed subject matter, and
- (D) an explanation as to why the claimed invention would have been obvious to one of ordinary skill in the art at the time the invention was made.

Appellants disagree with the “explanation why” in the final office action, i.e., Appellants disagree with the Examiner’s statement that “...FONTENOT et al does not limit the use of the liner to one in which the impervious layer is spatially lower than the other layers...” [final office action, Page 4 lines 4-5] Again, FONTENOT et al discloses:

[0055] In order to help reduce slippage of the liner during use, an outer surface of the liquid impervious layer that will come into contact with the container, drawer or shelf desirable has a coarse, rough or tacky surface. [Paragraph 0055 of Fontenot et al, *emphasis added*]

FONTENOT et al is one of the “applied reference(s)” that must be modified, and Appellants contend that without satisfying the “explanation why” requirement of MPEP 706.02(j), no prima facie case of obviousness has been set forth. In disclosing the impervious layer as coming into contact with the container, drawer, or shelf, FONTENOT et al is disclosing the impervious layer as being *lower* than the other layers. In stating that the use of the liner is as a liner for containers, shelves, and drawers,

FONTENOT et al does in fact limit the orientation of the liner so that it is effective for those disclosed purposes. To hold otherwise is to attribute more to FONTENOT et al than FONTENOT et al discloses. Without a valid “explanation why” the modification would have been obvious, there has been no showing as to why one of ordinary skill in the art would have modified the use of the liner of FONTENOT et al by inverting it. As such, no prima facie case of obviousness has been made out in the final office action.

As to the Examiner’s statement at Page 4 lines 3-7 of the final office action, i.e., that absorption of meat juices will occur whether the liner of FONTENOT et al is placed in the tray of SANFILIPPO et al with the liquid impervious layer either “up” or “down”, is the use Appellants’ specification to suggest a modification not suggested by the references themselves. In reality, the only document that provides the source of the suggestion to place the liner of FONTENOT et al into the tray of SANFILIPPO et al in an “upside-down” orientation is Appellants’ specification, which of course is not prior art. Neither FONTENOT et al nor SANFILIPPO et al serve as the source of the suggestion to invert the liner of FONTENOT et al. Moreover, FONTENOT et al teaches to orient the liner so that the liquid impervious layer is against the container, shelf, or drawer, i.e., so that the liner is oriented with the liquid impervious layer in the position of being the lowermost layer.

The Examiner has not provided an adequate explanation as to why one of ordinary skill would have inverted the liner of FONTENOT et al and then placed the liner into the tray of SANFILIPPO et al while the liner was in its inverted orientation. Without an adequate explanation why the modification of the reference would have been obvious, no prima facie case of obviousness has been set forth. The fact that the inverted liner

would absorb meat juices regardless of whether the impervious layer is “up” or “down” is not “an explanation why” one of ordinary skill would have inverted the liner, and is not an explanation why one of ordinary skill in the art would have used the liner in either orientation. Flipping the liner of FONTENOT et al upside down before placing it into the tray of SANFILIPPO et al would go against the teaching of FONTENOT et al to orient the liquid impervious layer so that it is *in contact with* the container, shelf, or drawer. The specification and examples in FONTENOT et al teach away from Appellants’ invention because the specification and examples in FONTENOT et al include a liquid impervious layer that is to be placed into contact with the container, shelf, or drawer in order to prevent the liquid from contacting the surface of the container, shelf, or drawer, so that the liquid does leave a hard-to-remove stain or residue on the container, drawer, or shelf, that often will emit a malodorous aroma.

This difference reveals that no prima facie case of obviousness has been made out in the 17 July Office Action or in the 18 March 2009 final office action. The §103 rejection relies upon the combination of SANFILIPPO et al in view of FONTENOT et al for the combination of a modified-atmosphere package having an absorbent pad having a liquid-permeable lower web comprising nonwoven fiber having a hydrophilic composition thereon, the nonwoven fiber comprising at least one member selected from the group consisting of polyolefin, polyamide, and polyester. Thus, this rejection relies upon attributing more to FONTENOT et al than FONTENOT et al discloses. As such, Appellants respectfully request reversal of the §103 rejection of Claims 1, 6-10, 14-18, 21, and 22, as unpatentable over SANFILIPPO et al in view of FONTENOT et al.

**II. Claim 5 Is Patentable Over SANFILIPPO et al in view of
FONTENOT et al, further in view of WILES**

Section 2 of the 18 March 2009 final Office Action states that the 35 USC 103(a) rejection of Claim 5 is repeated for the reasons on page 2 of the previous office action, which previous office action (i.e., the non-final office action of 17 July 2008) relies upon SANFILIPPO et al and FONTENOT et al as set forth under heading I above, and further states that GB 2296905A, to Wiles (“WILES”) teaches an improvement over the dual lid packaging of SANFILIPPO et al and FONTENOT et al in that fresh cuts of meats can be stored for about 9 days while the meat remains red in color by providing a 60-80% oxygen mixture in a single lid configuration, and that WILES also teaches that the type of gas selected depends upon the type of meat stored in the package, and therefore that it would have been obvious to select a 0-80% oxygen atmosphere since WILES teaches this type of atmosphere for red meats.

Appellants contend that the 18 March 2009 final Office Action and the 17 July 2008 non-final office action fail to set forth a prima facie case of obviousness of Claim 5. Appellants acknowledge that WILES teaches the use of 60-80% oxygen inside the package for the packaging of fresh meat. Nevertheless, since Appellants’ Claim 5 depends from Claim 1, in order to establish a prima facie case of obviousness, the combination of features from Claim 1 and Claim 5 must have been obvious from SANFILIPPO et al in view of FONTENOT et al further in view of WILES. The combination of SANFILIPPO et al in view of FONTENOT et al further in view of WILES does not teach or suggest a:

...liquid-permeable lower web comprising nonwoven fiber having a hydrophilic composition thereon, the nonwoven fiber comprising at least one member selected from the group consisting of polyolefin, polyamide, and polyester.... [see Appellants' independent Claims 1, 21, and 23 (*emphasis added*)],

Thus, the 18 March 2009 final office action and the 17 July 2008 non-final office action fail to set forth a prima facie case of obviousness of Claim 5 for at least the same reasons that the 18 March 2009 final office action and the 17 July 2008 non-final office action fail to set forth a prima facie case of obviousness of Claim 1 as unpatentable over SANFILIPPO et al in view of FONTENOT et al. Without motivation to invert the liner of FONTENOT et al to arrive at a "...liquid-permeable lower web..." as recited in Appellants' Claim 1, no prima facie case of obviousness has been made out. Appellants' recited liquid permeable lower web comprising nonwoven fiber having a hydrophilic composition thereon does not read on the water-impermeable web of the absorbent pad of FONTENOT et al. Accordingly, the rejection of Claim 5 as obvious over SANFILIPPO et al in view of FONTENOT et al further in view of WILES should be reversed, as no prima facie case of obviousness has been made out in the 18 March 2009 office action.

III. Claim 13 Is Patentable Over SANFILIPPO et al in view of FONTENOT et al further in view of MILLER

Section 3 of the 18 March 2009 final Office Action states that the 35 USC 103(a) rejection of Claim 13 is repeated for the reasons on page 2 of the previous office action, which previous office action (i.e., the non-final office action of 17 July 2008) relies upon SANFILIPPO et al and FONTENOT et al as set forth under heading I above, and further states that US 4,321,997, to Miller ("MILLER") teaches that it is conventionally known to use wood fluff in an absorbent pad and to combine it with a tissue layer to prevent

wood fluff dust from exiting openings in the pad and contaminating the pad. On this basis, the Office Action concludes that it therefore would have been obvious to have included an absorbent layer with both wood fluff and tissue paper since MILLER teaches that wood fluff is a known absorber and preferably to combine the wood fluff with the tissue paper to prevent wood fluff dust from exiting the pad and contaminating the food.

Appellants contend that the 18 March 2009 final Office Action and the 17 July 2008 non-final office action fail to set forth a prima facie case of obviousness of Claim 13. Appellants acknowledge that MILLER teaches an absorbent pad comprising both wood fluff and tissue-like paper wadding. Nevertheless, since Appellants' Claim 13 depends from Claim 1, in order to establish a prima facie case of obviousness, the combination of features from Claim 1 and Claim 13 must have been obvious from SANFILIPPO et al in view of FONTENOT et al further in view of MILLER. The combination of SANFILIPPO et al in view of FONTENOT et al further in view of MILLER does not teach or suggest a:

...liquid-permeable lower web comprising nonwoven fiber having a hydrophilic composition thereon, the nonwoven fiber comprising at least one member selected from the group consisting of polyolefin, polyamide, and polyester....
[see Appellants' independent Claims 1, 21, and 23
(*emphasis added*)],

Thus, the 18 March 2009 final office action and the 17 July 2008 non-final office action fail to set forth a prima facie case of obviousness of Claim 13 for at least the same reasons that the 18 March 2009 final office action and the 17 July 2008 non-final office action fail to set forth a prima facie case of obviousness of Claim 1 as unpatentable over SANFILIPPO et al in view of FONTENOT et al. Without motivation to invert the liner

of FONTENOT et al to arrive at a "...liquid-permeable lower web..." as recited in Appellants' Claim 1, no prima facie case of obviousness has been made out for Claim 13. Appellants' recited liquid permeable lower web comprising nonwoven fiber having a hydrophilic composition thereon does not read on the water-impermeable web of the absorbent pad of FONTENOT et al. Accordingly, the rejection of Claim 13 as obvious over SANFILIPPO et al in view of FONTENOT et al further in view of MILLER should be reversed, as no prima facie case of obviousness has been made out in the 18 March 2009 final office action.

IV. Claims 19 and 20 Are Patentable Over SANFILIPPO et al '411 in view of FONTENOT et al further in view of BAIR and LeKHAC

Section 4 of the 18 March 2009 final Office Action states that the 35 USC 103(a) rejection of Claims 19 and 20 is repeated for the reasons on page 2 of the previous office action, i.e., the non-final office action of 17 July 2008. The non-final 17 July office action states that Claims 19 and 20 are rejected under 35 USC 103(a) as unpatentable over SANFILIPPO et al in view of FONTENOT et al and further in view of US 5,135,787, to Bair ("BAIR") and US 4,743,244 to LeKhac ("LeKHAC"). The 17 July office action further states that BAIR teaches an absorbent pad wherein the outer web comprises non-woven polyester fibers with a wetting agent to impart hydrophilic character which includes cationic, anionic, nonionic or amphoteric surfactants such that the outer layers expand to contain the super absorbent and which also better distribute the fluid over the pad to overcome any possible clogging of the pores of the outer web, as well as to facilitate sealing. The 17 July office action goes on to state that LeKHAC teaches

enhancing the absorbing characteristics of polymers by adding non-ionic surfactant, such as block copolymers of ethylene oxides, including poly(oxyethylene).

In response, Appellants contend that the Office Action fails to set forth a prima facie case of obviousness of Claims 19 and 20. In the §103(a) rejection of Claims 19 and 20, the 18 March 2009 final office action and the 17 July 2008 non-final office action both rely upon FONTENOT et al for the disclosure of a liquid-permeable lower web comprising nonwoven fiber. Moreover, the combination of SANFILIPPO et al in view of FONTENOT et al further in view of BAIR and LeKHAC does not teach or suggest:

...liquid-permeable lower web comprising nonwoven fiber having a hydrophilic composition thereon, the nonwoven fiber comprising at least one member selected from the group consisting of polyolefin, polyamide, and polyester.... [see Appellants' independent Claims 1, 21, and 23 (emphasis added)],

Thus, the 18 March 2009 final office action and the 17 July 2008 non-final office action fail to set forth a prima facie case of obviousness of Claim 13 for at least the same reasons that the 18 March 2009 final office action and the 17 July 2008 non-final office action fail to set forth a prima facie case of obviousness of Claim 1 as unpatentable over SANFILIPPO et al in view of FONTENOT et al. Without motivation to invert the liner of FONTENOT et al to arrive at a "...liquid-permeable lower web..." as recited in Appellants' Claim 1, no prima facie case of obviousness has been made out for claims 19 and 20. Appellants' recited liquid permeable lower web comprising nonwoven fiber having a hydrophilic composition thereon does not read on the water-impermeable web of the absorbent pad of FONTENOT et al. Accordingly, the rejection of claims 19 and 20 as obvious over SANFILIPPO et al in view of FONTENOT et al further in view of

BAIR and LeKHAC should be reversed, as no prima facie case of obviousness has been made out in the 18 March 2009 final office action or the 17 July non-final office action.

The 17 July non-final office action also errs in stating that motivation lies in the disclosure in BAIR of the use of the wetting agent to "...better distribute the fluid over the pad to overcome any possible clogging of the pores of the outer web...." The "clogging of the pores" of the outer fabric is unrelated to the presence of the wetting agent on the fibers. Rather, BAIR states that the clogging of the pores of the outer fabric is due to swelling of the superabsorbent particles in the pad. [See BAIR at Col. 1 lines 60-65.] Thus, the office action has not shown why the clogging of the pores of the nonwoven fabric would be affected by the presence of the wetting agent on the fibers. Moreover, the maldistribution BAIR refers to is not maldistribution of the fluid over the pad, but rather is maldistribution of the superabsorbent powder to a particular part of the pad.

Still further, the Office Action errs in stating that motivation lies in the wetting agent having the ability to "...facilitate sealing." BAIR states that the hydrophilic outer fabric layers of the pad fabric perform three functions, with the third function being to facilitate sealing of the cut edges. [See BAIR at Col. 4 lines 46-51.] There is no indication in BAIR that it is the hydrophilic composition which would facilitate sealing. Moreover, one of ordinary skill in the art at the time the invention was made would have realized that it is the presence of the thermoplastic component of the nonwoven fabric of BAIR, i.e., the polyester homopolymer and/or polyester copolymer which facilitates sealing, not the wetting agent. Thus, the "facilitation of sealing" disclosed in BAIR is clearly not motivation to modify FONTENOT et al by application of wetting agent to the liquid pervious layer thereof.

In response to the statements in the Office Action pertaining to LeKHAC, Appellants note that LeKHAC is directed to water absorbent polymers, i.e., superabsorbent polymers, such as polyethylene oxides. While the Office Action characterizes block copolymers of ethylene oxides including poly(oxyethylene) as “non-ionic surfactants”, there is no indication in LeKHAC that poly(oxyethylene) is a non-ionic surfactant. The Office Action does not refer to any column and line of LeKHAC containing the phrase “non-ionic surfactant”, and a review of LeKHAC failed to reveal this phrase as being present in LeKHAC. Moreover, the Office Action implies that poly(oxyethylene) is a non-ionic surfactant based on Appellants’ Claim 19. However, Appellants note that Claim 19 does not recite a poly(oxyethylene) as a non-ionic surfactant. Rather, Claim 19 recites “...block copolymers of ethylene oxide or propylene oxide with dimethylsiloxane *that are coupled to polar groups containing a hydrophilic moiety*”. The Office Action does not state that LeKHAC discloses such copolymers which are coupled to polar groups containing a hydrophilic moiety. If the copolymer does not contain a hydrophilic moiety, there is no reason to believe that the copolymer would be a non-ionic surfactant. As such, it appears that the poly(oxyethylene) and similar polymers disclosed in LeKHAC do not meet the “...block copolymers of ethylene oxide or propylene oxide with dimethylsiloxane that are coupled to polar groups containing a hydrophilic moiety” recited in Appellants’ Claim 20. This is yet another reason that the office actions have not set forth a prima facie case of obviousness of claims 19 and 20.

**V. Claims 23 and 24 Are Patentable Over
SANFILIPPO et al '411 in view of DARNETT**

Section 5 of the 18 March 2009 final Office Action states that the 35 USC 103(a) rejection of Claims 23 and 24 is repeated for the reasons on page 2 of the previous office action, which previous office action (i.e., the non-final office action of 17 July 2008) relies upon SANFILIPPO et al and FONTENOT et al as set forth under heading I above.

In response, Appellants contend that the 18 March 2009 final Office Action and the 17 July 2008 non-final office action fail to set forth a prima facie case of obviousness of Claim 23 and 24. Neither SANFILIPPO et al nor FONTENOT et al teaches or suggests a:

...*liquid-permeable lower web* comprising nonwoven fiber having a hydrophilic composition thereon, the nonwoven fiber comprising at least one member selected from the group consisting of polyolefin, polyamide, and polyester.... [see Appellants' independent Claims 1, 21, and 23 (*emphasis added*)],

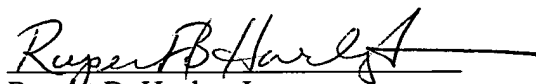
Since neither SANFILIPPO et al nor FONTENOT et al teaches or suggests a liquid-permeable lower web, the 18 March 2009 final office action and the 17 July 2008 non-final office action fail to set forth a prima facie case of obviousness of Claims 23 and 24 for at least the same reasons that the 18 March 2009 final office action and the 17 July 2008 non-final office action fail to set forth a prima facie case of obviousness of Claim 1 as unpatentable over SANFILIPPO et al in view of FONTENOT et al, i.e., as argued under heading "I" above. Without motivation to invert the liner of FONTENOT et al to arrive at a "...liquid-permeable lower web..." as recited in Appellants' Claim 23, no prima facie case of obviousness has been made out for Claims 23 and 24. Appellants' recited liquid permeable lower web comprising nonwoven fiber having a hydrophilic

composition thereon does not read on the water-impermeable web of the absorbent pad of FONTENOT et al. Accordingly, the rejection of Claim 23 and 24 as obvious over SANFILIPPO et al in view of FONTENOT et al should be reversed, as no prima facie case of obviousness has been made out.

VI. Conclusion

Appellant respectfully submits that, for all of the foregoing reasons, Claims 1, 5-10, and 12-24 are patentable over the art of record. The rejection of those claims should therefore be reversed, with a view towards allowance.

Respectfully submitted,

A handwritten signature in cursive script, reading "Rupert B. Hurley Jr.", written over a horizontal line.

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(8) Claims Appendix

1. A case-ready package for containing a food product which exudes juice, comprising:

(A) a support member;

(B) a lid member comprising a flexible film; and

(C) an absorbent pad comprising:

(i) an upper web comprising a flexible film;

(ii) a liquid-permeable lower web comprising nonwoven fiber having a hydrophilic composition thereon, the nonwoven fiber comprising at least one member selected from the group consisting of polyolefin, polyamide, and polyester; and

(iii) an absorbent layer between the upper web and the lower web;

wherein the upper and lower webs each extend outward of the absorbent layer, the upper and lower webs being attached to one another around an entire outer perimeter portion of the pad, with the upper and lower webs together surrounding and containing the absorbent layer, and the case-ready package further comprising modified atmosphere or vacuum between the support member and the lid member.

5. The case-ready package according to Claim 1, wherein the modified atmosphere comprises oxygen in an amount of from 60 to 80 percent, based on total atmospheric weight within the package.

6. The case-ready package according to Claim 1, wherein the modified atmosphere comprises atmospheric oxygen in an amount less than 5% by volume.

7. The case-ready package according to Claim 1, wherein atmosphere has been substantially evacuated from within the package.

8. The case-ready package according to Claim 1, wherein the upper web of the absorbent pad comprises at least one member selected from the group consisting of olefin homopolymer, olefin copolymer, polyester, and polyamide.

9. The case-ready package according to Claim 8, wherein the upper web of the absorbent pad comprises at least one member selected from the group consisting of ethylene homopolymer, propylene homopolymer, ethylene copolymer, propylene copolymer, polyester, and polyamide.

10. The case-ready package according to Claim 1, wherein the upper web of the absorbent pad is water-impermeable.

12. The case-ready package according to Claim 1, wherein the nonwoven fibers comprise at least one member selected from the group consisting of polyethylene, polypropylene, polyester, and polyamide.

13. The case-ready package according to Claim 1, wherein the absorbent layer comprises a layer of wood fluff and a layer of tissue paper.

14. The case-ready package according to Claim 1, wherein the absorbent layer further comprises superabsorbent.

15. The case-ready package according to Claim 14, wherein at least some of the superabsorbent is present in granular form.

16. The case-ready package according to Claim 1, wherein the upper and lower webs are attached with a heat seal.

17. The case-ready package according to Claim 1, wherein the upper and lower webs are attached with an adhesive.

18. The case-ready package according to Claim 1 wherein the support member comprises foam.

19. The case-ready package according to Claim 1, wherein the hydrophilic composition comprises at least one member selected from the group consisting of polysorbate, ethoxylated linear alcohol, fatty amine oxide, alkanolamide, and block copolymers of ethylene oxide or propylene oxide with dimethylsiloxane that are coupled to polar groups containing a hydrophilic moiety.

20. The case-ready package according to Claim 19, wherein the hydrophilic composition is present on the second web in an amount of from about 0.1 to 10 weight percent, based on the weight of the lower web.

21. A packaged product comprising a food product which exudes juice in a case-ready package comprising:

(A) a support member;

(B) a lid member comprising a flexible film; and

(C) an absorbent pad comprising:

(i) an upper web comprising a flexible film;

(ii) a liquid-permeable lower web comprising nonwoven fiber having a hydrophilic composition thereon, the nonwoven fiber comprising at least one member selected from the group consisting of polyolefin, polyamide, and polyester; and

(iii) an absorbent layer between the upper web and the lower web;

wherein the upper and lower webs each extend outward of the absorbent layer, the upper and lower webs being attached to one another around an entire outer perimeter portion of the pad, with the upper and lower webs together surrounding and containing the absorbent layer, and the case-ready package further comprising modified atmosphere or vacuum between the support member and the lid member.

22. The packaged product according to Claim 21, wherein the food product comprises at least one member selected from the group consisting of meat, poultry, cheese, and produce.

23. A process for making a case-ready package for containing a food product which exudes juice, comprising:

- (A) placing a product to be packaged on a support member having a base;
- (B) placing an absorbent pad on the support member, the absorbent pad comprising:
- (i) an upper web comprising a flexible film;
 - (ii) a liquid-permeable lower web comprising nonwoven fiber having a hydrophilic composition thereon, the nonwoven fiber comprising at least one member selected from the group consisting of polyolefin, polyamide, and polyester; and
 - (iii) an absorbent layer between the upper web and the lower web;
- wherein the upper and lower webs each extend outward of the absorbent layer, the upper and lower webs being attached to one another around an entire outer perimeter portion of the pad, with the upper and lower webs together surrounding and containing the absorbent layer, and the case-ready package further comprising modified atmosphere or vacuum between the support member and the lid member;
- (C) evacuating atmosphere from around the product and support member;
- (D) placing a lid member over the product and the support member so that the product is surrounded by the lid and the support member.

Claim 24 (original): The process according to Claim 23, further comprising surrounding the product and support member with a modified atmosphere after evacuation of the atmosphere bit before placing the lid member over the product and support member.

(9) Evidence Appendix

No evidence described in 37 CFR §41.37(ix) was submitted by Appellant or entered by the Examiner.

(10) Related Proceedings Appendix

There are no other appeals, interferences or judicial proceedings known to Appellant, Appellant's legal representative, or Assignee which may be related to, directly affect, be directly affected by, or have a bearing on the Board's decision in the pending appeal.